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CHARLES ELMORE GROPLEY
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No. 241.

In the
Supreme Court of the United States
OCTOBER TERM, 1942

KANSAS CITY LIFE INSURANCE COMPANY, a Corporation,
PETITIONER,

v.

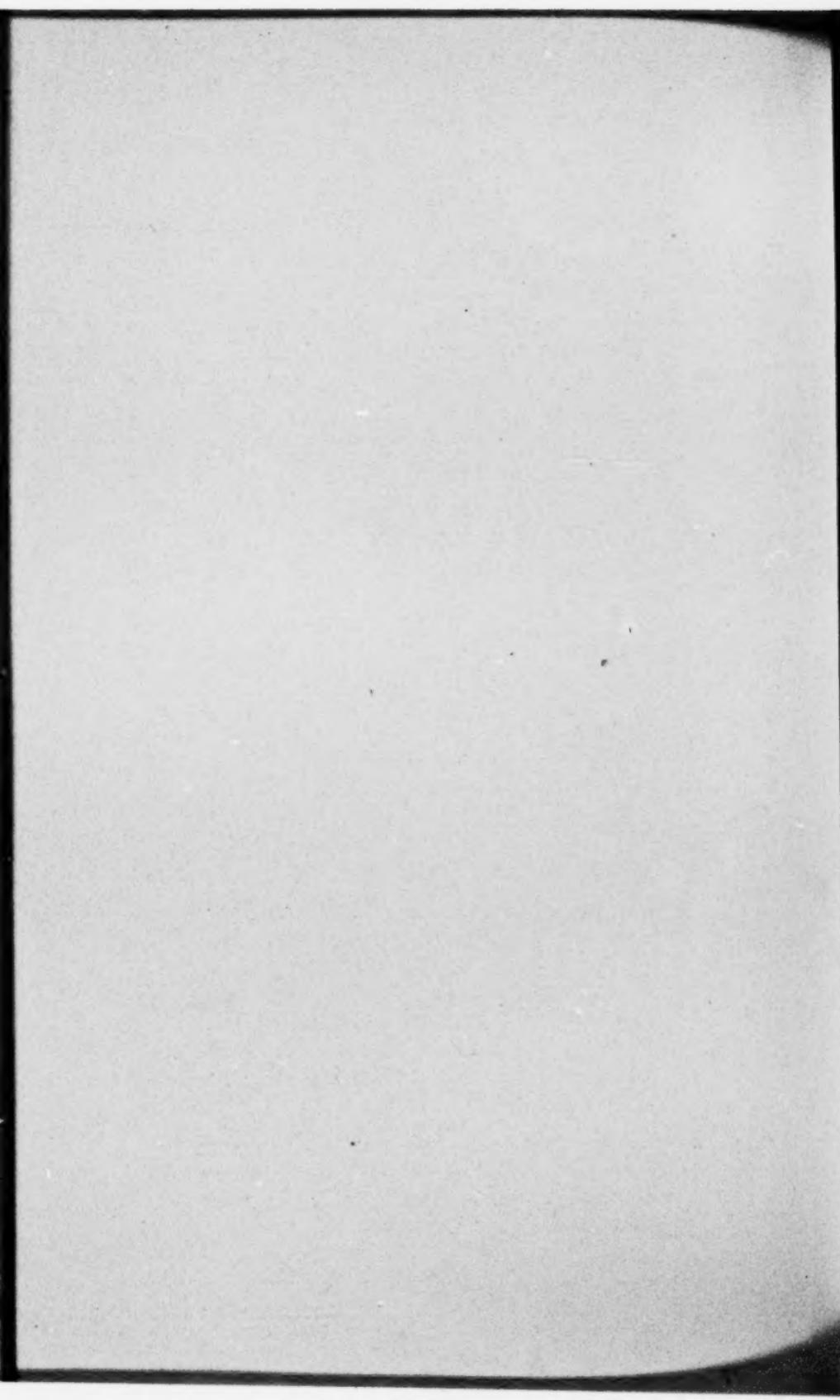
CARRIE J. PARFET, Administratrix of the Estate of George
W. Parfet, Deceased.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND
BRIEF IN SUPPORT THEREOF.

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In the
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No.

KANSAS CITY LIFE INSURANCE COMPANY, a Corporation,
PETITIONER,

v.

CARRIE J. PARFET, Administratrix of the Estate of George
W. Parfet, Deceased.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.**

Kansas City Life Insurance Company, a corporation, petitioner, respectfully prays for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered the 19th day of May, 1942 (R. p. 157).

QUESTIONS PRESENTED.

1. Whether it was reversible error for the District Judge in a civil case to reply to a query from the jury outside the presence of counsel under the following circumstances—no prejudice being shown and the answer being correct: The jury during its deliberations sent through the bailiff a written query whether proof of motive was necessary to establish suicide. The Judge, having

already instructed them to that effect, sent back the verbal answer, "No."

2. Whether in spite of Title 28, Sec. 391, U. S. C. A., and Rule 61 of the Rules of Civil Procedure, requiring a decision according to the substantial justice of the case and the disregard of technical errors not affecting the substantial rights of the parties, the said action of the District Judge in answering "No" outside the presence of counsel instead of in their presence, was per se reversible error.

3. Whether the evidence was such that no other verdict could have been sustained, and the alleged error in instructing the jury outside the presence of counsel was therefore necessarily harmless.

4. Whether as applied to *an action on an accidental death policy*, the Circuit Court of Appeals correctly decided the Colorado rule of law when it held it to require that "if under the evidence death by violence can be explained on any reasonable hypothesis other than suicide, it is the duty of the court or the jury to do so" or whether that is in conflict with applicable local decisions, as well as with applicable decisions of the United States Supreme Court and the Circuit Courts of Appeal of other circuits.

5. Whether in any event the federal courts are bound by the decisions of the state court on the question of the sufficiency of the evidence to sustain any verdict other than that rendered.

6. Whether in an action on an accidental death policy in which the question was accidental death or suicide, the exclusion of a statement by decedent made 50 days prior to his death showing future plans constitutes reversible error, where the fact that he had plans for the future was testified to by three other witnesses and was not disputed, where the proof of suicide related entirely to the few minutes preceding and following the explosion and statements by decedent before dying as to why he had done it, and where the only evidence of a disturbed frame

of mind related to a period of not more than a week prior to his death.

STATEMENT.

A policy of insurance issued by Kansas City Life Insurance Company on the life of George W. Parfet contained a double indemnity provision in the event of death by accidental means (R. p. 8). The insured died of injuries caused by an explosion of dynamite and the \$6,000 life insurance—the face of the policy—was paid (R. p. 10). This suit was to recover the double indemnity for accidental death. The court submitted to the jury the question of whether death was accidental or suicidal, and the jury returned a verdict for the defendant company (R. p. 13).

The decedent was fatally injured on the morning of March 21, 1940, and died a few hours later. The coroner's certificate, which under a Colorado statute* is *prima facie* evidence, showed death by suicide (R. p. 151). The first witnesses who arrived after the explosion found Parfet, the decedent, pounding on a dynamite cap with a metal file (R. p. 28). Piled around were seven or eight sticks of dynamite (R. p. 29). Subsequent to the first explosion in which he was injured, he had crawled back to the dynamite house (R. p. 61). As the witnesses approached he warned them off and threw a stick of dynamite at one of them (R. pp. 61, 62). After they had seized his arms and had taken away the file, he was asked why he had done it, and he said he was in a jam (R. p. 62), a bad enough jam to want to kill himself (R. p. 30), but that it was neither women nor embezzlement (R. p. 48). When the doctor told him he might live, he begged the doctor to administer something to put him out (R. pp. 48, 49). His watch, ring and billfold were found in the doghouse-like powder maga-

*Chap. 78, § 128, Colo. Stat. Ann., 1935, provides:
*** And any such copy of the record of a birth or death, when properly certified by the state registrar to be a true copy thereof, shall be *prima facie* evidence in all courts and places of the facts therein stated."

zine from which he had taken the dynamite (R. p. 33). None of this evidence was disputed.

To meet it and to sustain her burden of proving accidental death, plaintiff relied on the presumption against suicide and on testimony as to how an accident might happen with dynamite (R. p. 87). There was no attempt to prove that it did happen in any of the possible ways recited (R. p. 87). Plaintiff's counsel stated, "Our only defense" (to the evidence of suicide) "is to have an expert show how it could reasonably have happened" (R. p. 87). Plaintiff also offered evidence of cheerfulness, family felicity and plans for the future, none of which was disputed (R. pp. 73, 80, 82, 94, 95).

After the case had been submitted to the jury and while the jury were engaged in their deliberations, they handed to the bailiff a note to the judge in which inquiry was made as to whether it was necessary that a motive be proved in order to warrant the jury in finding that the death was by suicide. The bailiff handed the note to a deputy United States Marshal; he took it to the residence of the Judge, and there handed it to him; the Judge directed the deputy to answer verbally "No"; and that was accordingly done (R. p. 149). The parties and their attorneys were not present, were not consulted and did not consent to such communication between the court and the jury. The answer, however, was correct and the matter to which the inquiry related had been covered in the instructions of the court, which had not been objected to by plaintiff.

STATUTES AND RULES INVOLVED.

Title 28, Sec. 391, U. S. C. A., provides:

" * * * On the hearing of any appeal, * * * the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Rule 61 of the Rules of Civil Procedure provides:

“No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”

RULINGS OF THE COURTS BELOW.

After the jury's verdict for defendant, plaintiff moved for a new trial (R. p. 14) primarily because of the action of the Judge in answering the jury's question outside the presence of counsel. The District Court in overruling that motion said (R. pp. 19, 20):

“The contention is that the Judge should not have held communication with the jury except in open court in the presence of the parties and their counsel. This is undoubtedly the rule, but the tendency of the late cases—to say nothing of the statute and rules—is not to set aside a verdict on a technicality of this kind unless prejudice is shown. Situations of this kind were in the minds of the Congress in enacting Title 28, Sec. 391, U. S. C. A.” (which the court then quotes) “and Rule 61 of the Rules of Civil Procedure” (which the court then quotes).

“Furthermore an examination of the whole record in this case forces the conclusion that no other verdict could have been reached by the jury than the one in question. The statements of the deceased Parfet at the time of his death standing alone are conclusive on this question, and had any

other verdict been rendered it would have been the duty of the court to set it aside, pursuant to Rule 50 (b). * * *

"See the discussion in *Snyder v. Massachusetts*, 291 U. S. 97, beginning on page 114 etc., where, p. 122, Justice Cardozo speaking of such technicalities says, in effect, that the immunities assured by the Fourteenth Amendment would be brought into contempt if gossamer possibilities of prejudice are to nullify a judgment pronounced by a court of competent jurisdiction."

The Circuit Court of Appeals reversed the case, holding that even though the court's answer was correct, it constituted reversible error, saying (R. p. 154) :

" * * * The matter to which the inquiry related had been covered in the instructions of the court, and it may be conceded that the answer was a correct statement of the law. But where a case has been submitted to the jury and in the course of their deliberations the jury requests additional instructions, such instructions should be given in the presence of the parties or their attorneys, or after notice and an opportunity to be present. It is error for the court to receive a communication of this kind from the jury and make reply thereto in the form of an additional instruction in the absence of the parties or their attorneys, or without notice and an opportunity to be present, even though substantial prejudice is not affirmatively shown."

citing cases.

Defendant had contended that the error was necessarily harmless since no other verdict could have been sustained under the evidence. The Circuit Court, however, held that a special rule applied in Colorado and that in an action on an accident policy the court and jury must find against suicide—that is, that the death was accidental—

if the death could be explained on any other reasonable hypothesis than suicide, saying (R. p. 154):

“ * * * In Colorado death by *unexplained* violence is presumed to have been accident, evidence establishing death by violence *without explanation as to the manner in which the violence was inflicted* constitutes *prima facie* proof that the death was accidental, Occidental Life Ins. Co. v. United States Nat. Bank of Denver, Colo., 98 Colo. 126, 53 Pac. (2d) 1180; and if under the evidence death by violence can be explained on any reasonable hypothesis other than suicide, it is the duty of the court or the jury to so find, Prudential Ins. Co. of America v. Cline, 98 Colo. 275, 57 Pac. (2d) 1205.” (Italics our own throughout the brief.)

This, even though the violence and the manner in which it was inflicted, was clearly explained by the undisputed evidence of decedent's actions and statements after the explosion!

The court then held that the evidence did not conclusively establish suicide and the communication with the jury “cannot be regarded as harmless for the reason that under the evidence no other verdict could have been returned” (R. p. 154). In other words, the court held that in Colorado the burden of proof in an accident case was not on the plaintiff to prove accident, but on the defendant to prove suicide—and to prove it so conclusively that no other finding was possible.

The court further held that the exclusion of a statement by decedent made about 50 days prior to his death indicating plans for the future, was error (R. p. 156). It does not indicate whether it considers this error sufficient to justify reversal. That the decedent had plans for the future running beyond the date of his death was testified to by three other witnesses without objection (R. pp. 73, 80, 82, 83, 94, 95) and was undisputed. The court in its instructions twice called the attention of the jury to this evidence of decedent's future plans (R. pp. 145, 146).

REASONS FOR GRANTING WRIT.

(1) The Circuit Court of Appeals held that it was reversible error per se in a civil case to answer the question of the jury outside the presence of counsel even though the answer was correct and had already been covered in the instructions given to the jury and though no prejudice was shown. This is in conflict with the decision in *Sandusky Cement Co. v. A. R. Hamilton Co.* (C. C. A. 6), 287 Fed. 609; with *Outlaw v. United States* (C. C. A. 5), 81 Fed. (2d) 805; with *Ah Fook Chang v. United States* (C. C. A. 9), 91 Fed. (2d) 805; and with *Dodge v. United States* (C. C. A. 2), 258 Fed. 300; also with *Peppers v. United States* (C. C. A. 6), 37 Fed. (2d) 346; also with *Hagen v. United States* (C. C. A. 9), 268 Fed. 344; and with Rule 61 of the Rules of Civil Procedure and Sec. 391, Title 28, U. S. C. A.—which cases hold such error harmless.

The circuit courts are in absolute divergence as to the effect of the Albion Case (*Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76, 63 L. Ed. 853) in the light of the statute and the Rules of Civil Procedure.

(2) The Circuit Court of Appeals held the Colorado rule to be that in an action on an accident policy the court and jury must adopt any reasonable hypothesis other than suicide if under the evidence death by violence can be so explained, and relies upon the case of *Prudential Ins. Co. of Ameria v. Cline*, 98 Colo. 275, 57 Pac. (2d) 1205. The policy there involved was straight life insurance, not accidental death insurance, and the statement as to the law of Colorado is incorrect and in conflict with the following cases: *North American Accident Co. v. Cavaleri*, 98 Colo. 565, 58 Pac. (2d) 756; *Capitol Life Ins. Co. v. Di Iullo*, 98 Colo. 116, 53 Pac. (2d) 1183; *Occidental Life Ins. Co. v. United States Nat. Bank of Denver, Colo.*, 98 Colo. 126, 53 Pac. (2d) 1180; *Bickes v. Travelers Ins. Co.*, 87 Colo. 297, 287 Pac. 859 and *Roeber v. Cordray*, 70 Colo. 196, 199 Pac. 481.

(3) The Circuit Court of Appeals held itself bound

by what it deemed to be the Colorado rule—in an accidental death case—as to the burden of proof and the necessary evidence for a directed verdict, though contrary to the rule in the federal courts.

This is in conflict with *Crockett v. United States* (C. C. A. 4), 116 Fed. (2d) 646; *Gorham v. Mutual Benefit Health & Accident Ass'n* (C. C. A. 4), 114 Fed. (2d) 97; *New York Life Ins. Co. v. Sparkman* (C. C. A. 5), 101 Fed. (2d) 484; and *Herron v. Southern Pacific*, 283 U. S. 91, 75 L. Ed. 857.

(4) The Circuit Court of Appeals in an action on an accident policy held that if under the evidence death by violence can be explained on any reasonable hypothesis other than suicide, it is the duty of the court or the jury to so find.

This is in conflict with *New York Life Ins. Co. v. Gamer*, 303 U. S. 161, 82 L. Ed. 726; *Jefferson Standard Life Ins. Co. v. Clemmer* (C. C. A. 4), 79 Fed. (2d) 724; and *Provident Life & Accident Ins. Co. v. Nitsch* (C. C. A. 5), 123 Fed. (2d) 600.

(5) The question as to the meaning and applicability of Rule 61 of the Rules of Civil Procedure recently adopted by the Supreme Court, and Sec. 391, Title 28, U. S. C. A., is one of great public importance. Congress and the Supreme Court have attempted to improve and expedite the administration of justice by eliminating new trials and reversals for procedural errors not affecting the substantial fairness of the trial.

The Circuit Court of Appeals in this case has reversed on a procedural point without even mentioning or recognizing the existence of the rule or statute. A narrow construction or disregard of these rules will substantially impede the judicial reform sought to be attained.

The Circuit Court's ruling in this case seems a clear example of the evil sought to be cured. The error on which the case was reversed is of the most technical character—

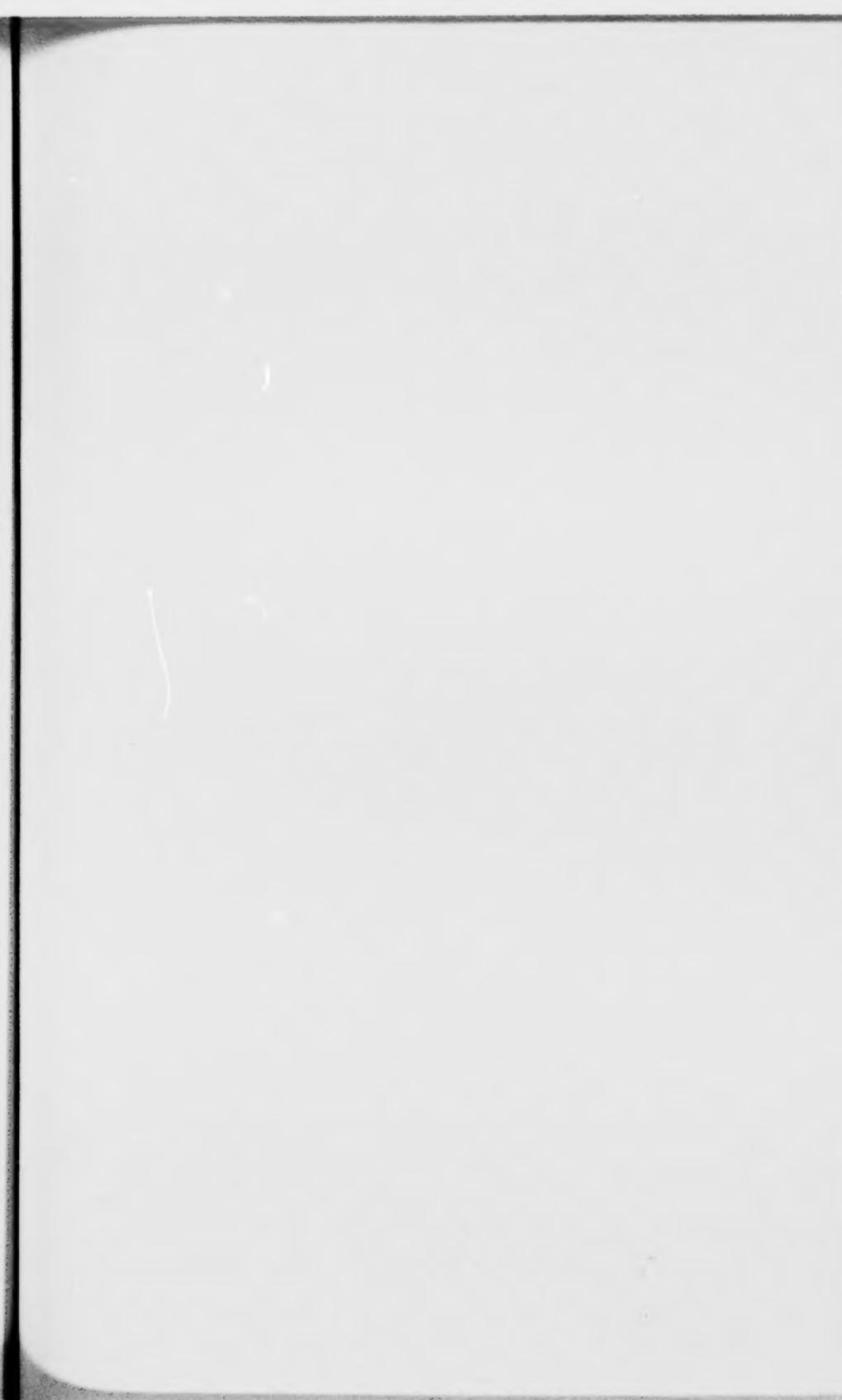
simply that the answer "No" was given the jury when counsel were not present, instead of when they were present.

(6) The Circuit Court of Appeals' misconstruction of the Colorado rule on the burden of proof in accidental death cases by confusing it with the rule in straight life insurance cases, will result if uncorrected in confusion and protracted litigation in the accidental death cases arising in the United States Courts in the District of Colorado and will maintain a conflict as to the correct rule, both with the Colorado courts and the federal circuit courts of other circuits and the United States Supreme Court.

CONCLUSION.

For these reasons it is respectfully submitted that this petition should be granted.

KANSAS CITY LIFE INSURANCE COMPANY,
By MORRISON SHAFROTH,
Attorney for Petitioner.





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PETITIONER,

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CARRIE J. PARFET, Administratrix of the Estate of George
W. Parfet, Deceased.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit in this case is reported in *Carrie J. Parfet, Administratrix of the Estate of George W. Parfet, Deceased, Appellant, v. Kansas City Life Insurance Company, a Corporation, Appellee*, No. 2395, 128 Fed. (2d) 361. This decision was rendered on May 18, 1942, and is found in the Record on page 153. The memorandum opinion of Judge Symes, of the District Court, (not reported) rendered May 23, 1941, is found in the Record, pages 18-20.

II.

JURISDICTION.

The jurisdiction of the court is invoked under Sec. 240 (a) of the Judicial Code as amended by the act of

February 13, 1925. The judgment of the United States Circuit Court of Appeals was entered on May 19, 1942, (R. p. 157).

III.

STATEMENT OF THE CASE.

A statement of the case is contained in the Petition for a Writ of Certiorari at page 3.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In reversing the judgment of the lower court and remanding the cause for a new trial.

(2) In holding that it was reversible error in a civil case to answer the question of the jury as to motive outside the presence of counsel even though the answer was correct and had already been covered in the instructions given to the jury.

(3) In holding that it was reversible error to receive a communication from the jury and make reply thereto in the absence of the parties or their attorneys even though substantial prejudice was not shown.

(4) In disregarding Sec. 391, Title 28, U. S. C. A., and Rule 61 of the Federal Rules of Civil Procedure, which prescribed that the court must disregard any error in the proceedings not affecting the substantial rights of the parties and that no error in anything done by the court is ground for setting aside a verdict or disturbing a judgment unless refusal to take such action appears to the court inconsistent with substantial justice.

(5) In holding the Colorado rule in an action on an accident policy to be that where death by violence can be explained on any reasonable hypothesis other than

suicide, it is the duty of the court or jury to do so, and in holding that such rule is applicable to this case.

(6) In holding that the federal courts were bound by the so-called Colorado rule.

(7) In holding that the evidence was not such as to require a verdict for defendant.

(8) In holding that the trial court erred in excluding a conversation between insured and his son 50 days prior to the explosion which caused insured's death.

V.

ARGUMENT.

An examination of the record in this case is convincing that the trial was fair and the verdict of the jury in accord with the very great preponderance of the evidence. The evidence throughout was undisputed save on one minor point. There was no dispute as to the actions and statements of the decedent at the time of the explosion. There was no dispute as to his cheerful disposition, happy family life and plans for the future. There was no dispute that dynamite could be accidentally exploded in various ways, but there was no evidence offered that it was so exploded. The only point on which there was a conflict in the evidence was on the question as to whether on the night before and for the few minutes immediately preceding the explosion decedent appeared overwrought (R. pp. 76-78). In view of his statements as to why he had committed suicide and his pounding of the second batch of dynamite, that question was of minor importance.

The trial lasted for two days and the jury of twelve men brought in a verdict for the defendant. The evidence was such as to make it perfectly clear to any ordinary person, unhampered by technical rules as to presumption, burden of proof, etc., that the decedent had not died by

accident, but had committed suicide.* The coroner so found and reported in his official certificate, and the jury of twelve, despite the well-known prejudice of juries against insurance companies, also found that there was no accident but that the decedent had committed suicide. The District Judge who heard the case and saw the witnesses and heard the arguments of counsel thought the

*(R. p. 28) RUTLEDGE: "Q. As you got up to him did you see what he was doing? A. Yes, sir. He was pounding on a cap with a file. Q. You mean a dynamite cap? A. Yes, sir. Q. Is that used to set off an explosion of dynamite? A. It is. Q. Were there sticks of dynamite placed near the cap? A. Yes, there were."

(R. p. 30) "Q. Did you ask him why he had done it? A. I did. Q. And what did he say to that? A. He says 'I am in a jam.' Q. And then what did you say? A. I says 'You are not in a bad enough jam to want to kill yourself.' Q. And what was his reply to that? A. He said 'Yes, I am,' or something to that effect."

(R. p. 48) HOWLETT: "A. When I first came up I said 'How in the world did this happen?' and he said 'I did a bum job of it.' Then I said 'Did you do this, George?' and he didn't answer me. In a few seconds I said 'What made you do it?' and he said 'I am in a terrible jam.' I didn't have any more conversation with him right at that time. I looked about his general physical condition, and gave him something to relieve pain, and later I asked him what kind of a jam he was in, and he said 'In every way,' and I asked him if he was in a jam with some girl, or if he had embezzled some money, or why in the world he would do something like that, and he said no, it wasn't anything like that. Then I said 'What kind of a jam are you in?' and he said 'In every way,' and then his head went over, and he was unconscious, and he didn't talk any more. * * * Q. Do you recall any conversation with Mr. Parfet? You haven't testified relative to whether he was going to live. A. Yes, sir, there was. He asked me if I thought he would make it, and I says 'Yes, George, I think you will,' and he said 'For Christ's sake give me something to put me out.' "

matter so clear that no other verdict was possible under the evidence and so stated in denying plaintiff's motion for a new trial. It seems impossible that anyone could hold that plaintiff sustained the burden of proving accident.

An analysis of the Circuit Court's opinion overturning the jury's verdict and sending the case back for a new trial shows that it was based on what it conceived to be two errors. The first of these was the technical ground that the Judge answered the jury's question with the word "No" outside the presence of counsel instead of in their presence. The court concedes that answer was correct.* The matter had already been fully covered in the instructions given to the jury to which no objection was made by plaintiff, and it would seem that there could hardly be even a gossamer possibility of actual prejudice from this action of the court.

The Circuit Court in its opinion by conceding the correctness of the answer, hinges its reversal on a bare formality. There may be some justification for this careful regard for the minutiae of procedure in criminal cases where the law throws every protection around the accused, but it is difficult to understand the profound veneration of this formality** in a civil case where substantial

*See *New York Life Ins. Co. v. Sparkman*, 101 Fed. (2d) 484, 487 (C. C. A. 5): "A motive for suicide is helpful to the defense but is not essential. * * * This is so because in this life men who have no apparent motive for it do commit suicide. Perhaps always in the case of a sane person who commits suicide there is a motive, but in many cases the motive is not and possibly could not be proven."

***Kimmins v. Montrose*, 59 Colo. 578, 581, 151 Pac. 434: "Good practice required that the court before giving this instruction should have called the jury into the court room and read it to them in the presence of counsel for both sides, unless they waived this formality. * * *

"*Moffit v. People*, 149 Pac. 104. While the giving of

justice was clearly done and the trial was obviously fair, and in the face of Rule 61 and the statute.

While in effect holding that the court's action was *per se* reversible error without regard to prejudice, the Circuit Court nevertheless was apparently not quite convinced of the correctness of its position on that point for it felt obliged to answer defendant's argument that no prejudice could by any possibility have resulted because on the evidence no other verdict could have been rendered.*

In attempting to show that it was possible that a verdict for plaintiff could have been sustained, the Circuit Court was confronted with the many federal cases, including those of the Tenth Circuit, which had held that when from the evidence the conclusion of non-liability was as reasonable as that of liability, a verdict for plaintiff rests on surmise and cannot be upheld.**

The Court in this case was confronted with the purely speculative theories of the plaintiff that the dynamite might have been exploded by a match, or a cigarette, or

the instruction in this manner was *bad procedure*, we cannot hold it to be reversible error, because it does not appear that it in any manner prejudiced the rights of the defendant." (italics supplied) citing *Moffit v. People*, 59 Colo. 406, 149 Pac. 104; see also *Slack v. Stephens*, 19 Colo. App. 538, 76 Pac. 741; *Tilley v. Montelius Piano Co.*, 15 Colo. App. 204, 61 Pac. 483.

*See statement of this rule in 5 C. J. Sec. 1676, p. 805, and 3 Am. Jur., §§ 1111, 1112, p. 634, and Chicago, Milwaukee & St. P. Ry. Co. v. Ross, 112 U. S. 377, 28 L. Ed. 787.

***N. Y. Life Ins. Co. v. Doerksen* (C. C. A. 10) 75 Fed. (2d) 96, 99 (accident insurance case); *Equitable Life Assur. Society v. Guiou* (C. C. A. 8) 86 Fed. (2d) 865, 868 (life insurance case); *Scales v. Prudential Ins. Co. of America* (C. C. A. 5) 109 Fed. (2d) 119 (accident insurance case); *Frankel v. New York Life Ins. Co.* (C. C. A. 10) 51 Fed. (2d) 933 (accident insurance case); *AT&SF Ry. Co. v. Toops*, 281 U. S. 351 (negligence case).

a ricochet bullet, or by being stepped on. There was no evidence that any of those things actually happened. Had any of them happened, the insured would certainly have said so instead of saying he was in a bad enough jam to want to kill himself. There was no unexplained violence whatever.

As the Circuit Court of Appeals for the Eighth Circuit said in *Equitable Life Assur. Soc. v. Guiou*, 86 Fed. (2d) 865, in holding that under a straight life insurance policy, where the defense was suicide, the evidence for plaintiff was not sufficient to take the case to the jury (p. 868) :

“ * * * But verdicts must be rested upon substantial evidence and vague possibilities conjured up or conjectured by fertile minds do not suffice.”

The Circuit Court of Appeals for the Tenth Circuit itself said in *New York Life Ins. Co. v. Doerksen*, 75 Fed. (2d) 96, the question being accident or suicide under a double indemnity policy (p. 99) :

“But it is not enough that under the facts liability might exist; if a different conclusion may as reasonably be drawn from the facts, then the jury may not guess as between equally probable causes.”

And on p. 98 the same court says:

“ * * * if such evidence left the question so open that a conclusion of non-liability is as reasonable and plausible as the conclusion of liability, then the verdict rests on surmise and must be set aside. The Supreme Court of the United States has steadfastly adhered to this rule in a long line of cases commencing with *Patton v. Texas & Pac. R. Co.*, 179 U. S. 658, 663.”

In *Frankel v. New York Life Ins. Co.* (C. C. A. 10) 51 Fed. (2d) 933, the court held that the presumption against

suicide, a composed mental attitude and a motive opposed to self-destruction together with the possibility of accident were not sufficient to send the case to the jury. The decedent in that case was found at the rear of his store with a bullet in his head and a pistol beside him. Plaintiff contended that he might have been assassinated or that he might have stumbled and accidentally discharged the weapon. But the court held all that was purely speculative, saying (p. 935):

“The administratrix was not entitled to have this unfortunate case submitted to the jury. A finding in her favor could not be allowed to stand and the trial court would have been required to set it aside in the exercise of sound judicial discretion.”

In *Scales v. Prudential Ins. Co. of America*, (C. C. A. 5) 109 Fed. (2d) 119, in a double indemnity case, the evidence was lack of motive for suicide, happy disposition, pleasant family relations, and that the pistol which killed him and which was found beside him had gone off in the past in an unexplainable manner. But the court instructed a verdict for the defendant, holding that the presumption against suicide together with the possibility that it might have gone off accidentally while deceased was holding it up to the light while looking down the barrel was not sufficient to take the case to the jury.

In the face of these opinions of the Tenth Circuit and of the other circuits where precisely the same type of evidence as was offered by the plaintiff in this case was held insufficient to take the case to the jury, the Circuit Court rested its opinion that it was possible that a verdict for plaintiff could have been sustained in this case, on the ground that the Colorado Supreme Court in *Prudential Ins. Co. of America v. Cline*, 98 Colo. 275, 57 Pac. (2d) 1205, had laid down a special rule and had held that the judge and jury must hold against suicide

and for accidental death if there is any reasonable hypothesis in the evidence on which this can be done, thus virtually requiring proof by defendant beyond a reasonable doubt. The case relied on, however, does not support the court's position as it was a straight life insurance case in which the rule is the exact opposite of that applicable in actions for accidental death, as we will point out in a later section of our brief.

The error in the interpretation of the Colorado law is clear. Furthermore, in order to get away from the fact that the United States Supreme Court in *New York Life Ins. Co. v. Gamer*, 303 U. S. 161, had held the opposite rule to apply in the federal courts, clearly placing the burden of proof on the plaintiff to prove accidental death, as had the decisions both in the Tenth Circuit and in other circuits hereinbefore cited, the Circuit Court was obliged to in effect hold that this so-called Colorado rule was binding on the federal court here. The net result was the adoption of a rule of proof in this case in conflict with both the true Colorado rule and with the rule of the United States Supreme Court and the federal courts generally. Furthermore, the ruling by implication that the federal court was bound by the so-called Colorado rule is in conflict with the rule prevailing in many other circuits and probably with that adopted by the United States Supreme Court in *Herron v. Southern Pacific Ry. Co.*, 283 U. S. 91, 75 L. Ed. 857.

Only one other error is mentioned by the Circuit Court of Appeals, to-wit: The exclusion of decedent's statement as to future plans. The matter was considered by opposing counsel of such slight importance that they did not even mention it in their motion for a new trial (R. pp. 14-17). That this exclusion, if error, was harmless is obvious from a consideration of the evidence. Three other witnesses, including one of the defendant's, testified to the fact that decedent had future plans and their

testimony was undisputed (R. pp. 73, 82, 94, 95). They were the same plans covered in the excluded evidence; which was offered. In the entire course of the trial it was never once disputed in any way that decedent had had plans for the future. The court in instructing the jury, twice called their attention to the evidence that decedent did have future plans (R. pp. 145, 146). The testimony excluded was as to a statement by decedent made about 50 days prior to the explosion causing his death. The only evidence in the entire record as to his having a disturbed mental condition related to the period within a week of his death after some possible financial irregularities in the district for which he was responsible as county commissioner were brought to his attention by the state treasurer. Under the circumstances of the case, the testimony would seem too remote to bear on any issue in the case, but in any event the exclusion was harmless since other undisputed testimony clearly showed that at a time quite close to the date of his death he did have these future plans for himself and his son—plans which were testified to by defendant's own witness (R. p. 73).

**THE COURT'S RULING THAT THE TRIAL JUDGE'S COMMUNICATION TO THE JURY OUTSIDE THE PRESENCE OF COUNSEL PER SE CONSTITUTES REVERSIBLE ERROR IS CONTRARY TO SANDUSKY CEMENT CO. v. A. R. HAMILTON CO. (C.C.A. 6
287 FED. 609, AND OTHER CASES.**

In the *Sandusky* case, *supra*, (pp. 610, 611):

"While the jury was deliberating, it sent a written communication to the trial court reading as follows: 'There seems to be a division of the jury over your instructions on this point, viz: Is the Hamilton Company liable under this contract in any one month more than the pro rata share?' At the time this communication reached the court neither of the parties or their counsel were present. The court was then engaged in the trial of another cause and, without giving counsel an opportunity

to be present, sent to the jury the following answer in writing * * *."

The court held (pp. 611, 612) :

"It is insisted, however, that this error was not prejudicial, that the charge as given was correct, and that under the provisions of section 269 of the Judicial Code as amended February 26, 1919 (U. S. Compiled Statutes, 1919 Supplement, volume 1, § 1246), this court has no authority to reverse a judgment for technical errors, defects or exceptions which do not affect the substantial rights of the parties.

"* * * There is nothing in this supplementary charge that changes, modifies, or adds to the charge as given. On the contrary, it is but a repetition of the general charge of the court upon the same subject-matter, and, though perhaps it is differently phrased, nevertheless it is substantially identical and could not have been prejudicial to either party."

The court distinguishes the case of *Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76, 63 L. Ed. 853, relied on in the Circuit Court of Appeals opinion herein on the ground that in the Fillippon case the supplemental charge as given was erroneous and prejudicial in substance. The United States Supreme Court in the *Fillippon* case, *supra*, said (p. 856) :

"In this case, so far from the supplementary instruction being harmless, in our opinion it was erroneous and calculated to mislead the jury in that it excluded a material element that needed to be considered in determining whether plaintiff should be held guilty of contributory negligence under the particular hypothesis referred to in the jury's question."

In *Dodge v. United States* (C. C. A. 2) 258 Fed. 300, the

bailiff brought to the judge a communication from the jury asking whether the defendant could be convicted on the first count. Without giving counsel a chance to object, he replied through the bailiff, "Yes." Said the court (p. 305) :

"In the instant case it is evident that no possible harm resulted or could result from the communication which passed between court and jury. The communication gave the jury no information which was not contained in the original charge. While the judge should not have done what he did, to reverse on that ground would under the circumstances be so extremely technical that it does not at all approve itself to our judgment."

In *Outlaw v. United States*, (C. C. A. 5) 81 Fed. (2d) 805, certiorari denied 298 U. S. 665, 80 L. Ed. 1389, the jury during its deliberations communicated to the trial court through the bailiff that they desired a copy of the oral charge which had been given to the jury. Without notifying counsel, the court sent it to them. Said the court (pp. 808, 809) :

"* * * The bald contention is that the judge should have held no communication with the jury except in open court with the knowledge of the accused and his counsel. * * *

"Formerly there was a presumption of prejudice, and the error was reversible. We are of opinion that since the passage of the Act of Feb. 26, 1919, 40 Stat. 1181, 28 U. S. C. A. § 391, it may sometimes be otherwise. * * * There has been no authoritative determination of what is meant by 'technical errors' and 'substantial rights.' * * * errors of procedure which do not affect the result of the trial are certainly among the 'technical errors' which Congress may require, and has required, to be disregarded. While a private com-

munication between judge and jury is usually irregular and erroneous, it may not in all cases prevent a constitutional or a legal trial. * * * If the jury had been recalled and the charge read to them in appellant's presence, no different result can be supposed. * * * The trial under review in *Filippon v. Albion Vein Slate Co.*, 250 U. S. 76, 77, 39 S. Ct. 435, 63 L. Ed. 853, occurred before the passage of the statute under discussion and in the opinion no reference is made to it. The communication involved there was a new charge, and moreover, an incorrect one, amply distinguishing that case from this. * * *

"Finding no reversible error, we affirm the judgment."

See also *Ah Fook Chang v. United States*, (C. C. A. 9) 91 Fed. (2d) 805, decided July 26, 1937, where there was a communication by the court to the jury in reply to the jury's question.

In *Hagen v. United States* (C. C. A. 9), 268 Fed. 344, while defendant and his counsel were absent from the court room, the judge withdrew from the jury a confession made by one defendant and repeated a part of his charge relating to the effect of the confession. The court said (p. 347):

"* * * At most, what occurred was but an irregularity, which should not have the effect to require that a trial be set aside, which in other respects was fairly and properly conducted."

See also *Peppers v. United States* (C. C. A. 6) 37 Fed. (2d) 346, and *Philadelphia & R. Ry. Co. v. Skerman*, (C. C. A. 2) 247 Fed. 269.

There is a definite conflict between the circuits as there are several cases in other circuits to the contrary.

THE CIRCUIT COURT'S DECISION THAT THE COURT OR JURY IN AN ACCIDENTAL DEATH CASE MUST FIND AGAINST SUICIDE AND FOR ACCIDENTAL DEATH IF THE EVIDENCE UNDER ANY REASONABLE HYPOTHESIS PERMITS SUCH FINDING, DOES NOT CORRECTLY STATE THE COLORADO RULE AND IS IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.*

The Circuit Court of Appeals relies on the case of *Prudential Insurance Co. of America v. Cline*, 98 Colo. 275, 57 Pac. (2d) 1205, decided January 27, 1936, rehearing denied March 30, 1936. The action there was on a straight life insurance policy and not on an accidental death claim. Plaintiff proved his case when he showed the death of the insured and nothing more. Defendant, to avoid liability, had to prove suicide within a year and the Colorado Supreme Court said (pp. 276, 277) :

“On January 18, 1933, the defendant insured the life of Agnes L. Bjorkman for \$1,000 for the benefit of her husband, Ernest H. Bjorkman. The insured died within the year, to-wit, on October 18, 1933. Upon the refusal of the defendant to pay the amount of the policy, Bjorkman sued. So far as pertinent here, he alleged the issuance of the policy and the death of the insured. * * *

* * * * *

“The court gave the following instruction: ‘Suicide must be proven, and if you can reconcile the facts of this case upon any reasonable hypothesis, based upon the evidence, that death of the insured was not caused by suicide, it is your duty to do so.’ As the defendant made no objection to the instruction, it became the law of the case. Supreme Court rule No. 7. Its correctness is not challenged at this time. Was the evidence such as to exclude

*The Circuit Court's language is that “if under the evidence death by violence can be explained on any reasonable hypothesis other than suicide, it is the duty of the court or jury to so find.” (R. pp. 154, 155)

all reasonable hypotheses other than that of suicide?"'

The court will observe that even for a life insurance case the Colorado court did not flat-footedly approve the instruction.

This "reasonable hypothesis" instruction is lifted almost verbatim from a popular defendant's instruction in criminal law, where it is used to compel the prosecution to prove its case beyond a reasonable doubt.*

Sometimes the word, "supposition," is substituted for its synonym, "hypothesis."

If the Colorado Supreme Court intended to approve this drastic instruction in a *straight life* insurance case, the ruling seems doubtful enough. But certainly the intention should not be lightly imputed to that court to apply it to an *accident* insurance case where its effect is to reverse the burden of proof, relieve plaintiff of the duty of proving accident by a preponderance of the evidence, and compel defendant to prove that the death was not accidental, by evidence so conclusive as to virtually establish that fact beyond a reasonable doubt.

That it had no such intention is evident from an examination of two accident insurance cases which the Colorado court had under consideration at the same time as the *Prudential* case, *supra*, and which are reported in the same volume of the Colorado reports, and from the established Colorado rule as to the effect of presumptions laid down in *Roeber v. Cordray*, 70 Colo. 196, 199 Pac. 481.

*See *Brickwood-Sackett on Instructions to Juries*, 3d ed. vol. 2, p. 1739, § 2709, where the following form instruction is set forth: "In considering the evidence if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendant's innocence, it is your duty under the law to do so and if you have a reasonable doubt of his guilt, you should acquit him."

Incidentally, it should be borne in mind in the consideration of these cases that in the pending case there was no "unexplained violent external means." The undisputed verbal statements of insured as to why he did it, and his undisputed verbal act in pounding the dynamite in an effort to set off a second explosion, is a very clear explanation by the one who knew best and leaves no room for presumption or speculation.

In *North American Accident Insurance Co. v. Cavaleri*, 98 Colo. 565, 58 Pac. (2d) 756, decided May 30, 1936, and on rehearing, June 15, 1936, the suit was on an accident insurance policy and the court said (p. 566):

"In order to recover on a policy insuring against accidental death, a plaintiff must prove that the insured died as the result of an accident."

And in *Capitol Life Ins. Co. v. Di Iullo*, 98 Colo. 116, 53 Pac. (2d) 1183, decided December 23, 1935, and rehearing denied January 27, 1936, the court clearly distinguishes between the proof necessary under a straight life insurance case, such as was at issue in *Prudential Co. v. Cline, supra*, and an accident insurance case, such as was passed on in the *Cavaleri* case *supra*, saying (p. 118):

"In the case of a straight life insurance policy providing for the payment of money upon the death of the insured the condition upon which liability depends is the death of the insured, and, his death being shown, within the coverage of the policy, ***.

" * * * Where, however, a policy provides for the payment of money upon the death of the insured as a result of accident, there are two conditions upon which liability depends; namely, (1) death of the insured and (2) accidental cause of such death. * * * But under the double indemnity provision no liability arises unless death results from accident. Suicide by the insured while sane is not an accident. * * * There is no liability on the part of the insurer, not because the insured com-

mitted suicide, but because there was no accident, and, as we have seen, the double indemnity clause provides for payment only in case of death by accident. It does not cover nonaccidental death. It may just as reasonably be held that on a straight life insurance policy, providing for the payment of money on the death of the insured, the insurer is liable where there has been no death, as to hold that on a policy providing that money shall be paid in case of death by accident, the insurer is liable where there has been no accident.”

The distinction made by the Colorado Supreme Court is in accord with the rule laid down by the United States Supreme Court in the *Gamer* case (303 U. S. 161). It clearly does not sustain the interpretation of the Colorado law made by the Circuit Court of Appeals.

In *Occidental Co. v. U. S. Bank*, 98 Colo. 126, 53 Pac. (2d) 1180, decided December 23, 1935, in an action on an accidental death policy the Court said (p. 131):

“When death by unexplained violent external means is established, the law does not presume suicide or murder; the presumption is to the contrary. Such a showing is *prima facie* proof that the death was accidental” (citing cases). “But that *prima facie* showing may be overcome by evidence, either direct or circumstantial. In the present case there was more than the bare fact of death by unexplained violent external means; there were circumstances sufficient to require a finding whether the death was accidental or suicidal.”

See, also, *Bickes v. Travelers Insurance Company*, 87 Colo. 297, 287 Pac. 859.

The settled rule in Colorado as to the effect of such presumptions as those against suicide and against insanity is found in *Roeber v. Cordray*, 70 Colo. 196, 199 Pac. 481.

The Colorado Supreme Court there said (pp. 197, 198):

“By offering the will for probate the proponent, in effect, asserted that it was executed by Roeber at a time when he was of testamentary capacity. This proposition has the benefit of the presumption of sanity which the law raises. The presumption being one of fact, it is only a matter of evidence and does not in any sense relieve the proponent of the obligation to establish by a preponderance of evidence the affirmative of the issue tendered. If no evidence to the contrary is introduced, a case is made, but if such evidence be introduced the question then is whether upon the whole evidence, including this presumption, the burden of proving the affirmative has been sustained.

“If the evidence be evenly balanced, the finding will be for the contestant” (citing cases and quoting with approval the following from *Young v. Miller*, 145 Ind. 652): “‘A prima facie case, made by the plaintiff, must always stand unless its force is broken by the defendant’s evidence; but the defendant is never required, under the general denial, to negative the truth of the plaintiff’s prima facie case by a preponderance of the evidence. If, upon the whole evidence, the plaintiff does not have a preponderance, the defendant must recover. If the scales are equally balanced the plaintiff must fail. It is perfectly clear, therefore, that to break the force of a prima facie case it is not necessary that the contrary shall be established by a preponderance of the evidence but that it is sufficient if from the evidence pro and con the plaintiff cannot be said to have a preponderance upon his side of the issue.’

“So far then as this instruction places upon the contestants *the burden of proving a want of testamentary capacity*, the instruction is wrong, and was undoubtedly prejudicial.”

The Circuit Court of Appeals has taken this doubtful life insurance rule (where the burden was on defendant) and applied it to an accident case (where the burden was on plaintiff), moreover, to one in which there was no unexplained violence. The court's interpretation of the Colorado law is clearly incorrect and in conflict with the Colorado decisions which despite the presumption require plaintiff to establish his case by a preponderance of the evidence. The Circuit Court reversed on its erroneous assumption that Colorado did not so require.

THE SAID RULING IS LIKEWISE IN CONFLICT WITH APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT AND WITH THE CIRCUIT COURTS OF OTHER CIRCUITS.

In *New York Life Insurance Company v. Gamer*, 303 U. S. 161, 82 L. ed. 726, the action was on the provision of a life insurance policy calling for double indemnity in case of accidental death. The lower court, as did the Circuit Court in this case, placed the burden of proving suicide on the defendant saying (p. 167): "The presumption of law is that the death was not voluntary and the defendant, in order to sustain the issue of suicide * * * must overcome this presumption and satisfy the jury by a preponderance of the evidence that his death was voluntary * * *."

The Circuit Court of Appeals in the pending case has gone much further than did the lower court in the *Gamer* case. In the pending case the Circuit Court has not only placed the burden of proof on the defendant, but has in effect declared that it must prove suicide beyond a reasonable doubt or the jury must bring in a verdict for plaintiff. The Supreme Court in holding that even the comparatively mild instruction in the *Gamer* case above quoted placed an improper burden on the defendant and in reversing the case, said (pp. 171, 172):

"Under the contract in the case now before us, double indemnity is payable only on proof of death by accident as there defined. The burden was on

plaintiff to allege and by a preponderance of the evidence to prove that fact. * * *

* * * * The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed. The presumption is not evidence and may not be given weight as evidence."

The ruling of the Circuit Court in the pending case is in clear and direct conflict with this decision of the United States Supreme Court.

In *Jefferson Standard Life Ins. Co. v. Clemmer* (C. C. A. 4) 79 Fed. (2d) 724, the insured was found in a locked bedroom dead from a pistol wound in his forehead, the weapon lying in a pool of blood at his feet. He was a young, vigorous man in good health, fond of athletics and of a happy disposition. There was evidence that shortly before his death he was worried over the condition of a young woman he had gotten in trouble. The defense was that the pistol was rusty and might have been accidentally discharged while he was attempting to clean it. It was also suggested that the pistol might have been discharged by a fall to the floor, and that decedent accidentally dropped it and received the fatal wound. The court held the case should never have been submitted to the jury, but defendant should have had a directed verdict.

The instruction of the lower court was in accord with the Circuit Court's statement of the law in this case—the instruction that, "the burden rests upon the defendant to produce evidence to overcome the presumption of accident and to satisfy the jury that the death was suicidal; and that this burden upon the defendant is met when the jury is satisfied that there is no other reasonable explanation of

the death but suicide." The court, in reversing the case, severely criticises the instruction, saying (p. 731):

"* * * But when the court goes further and introduces the presumption itself as evidence to be considered by the jury, or places the burden on the defendant to satisfy the jury by a preponderance of evidence, he states the principle too strongly and may cause a miscarriage of justice; and *a fortiori*, when he imports into the trial the rule of reasonable doubt applicable in prosecutions for crime, he makes it wellnigh impossible for the jury to find for the defendant. The result has been in many cases of self-destruction to be found in the books, that judge and jury alike have been unable to take a common-sense view of the facts of life, and have seemed to be the only persons in the community who did not clearly understand what had taken place.

* * * *

"The differences that have arisen as to which party bears the burden of persuasion in insurance cases, when the defense is based on suicide, have been caused in part by a failure to distinguish between cases in which the plaintiff sues on an accident insurance policy or the double indemnity clause of a life insurance policy, and cases in which the insurer in a life policy raises the defense of suicide. If death from any cause except suicide is insured against, the burden is on the company to prove the exception; but if death from one specific cause, such as accident, is insured against, the burden is on the policyholder to show that the condition precedent to liability has taken place. Home Benefit Ass'n. v. Sargent, 142 U. S. 691, 12 S. Ct. 332, 35 L. Ed. 1160; Parrish v. Order of United Commercial Travelers (C. C. A.) 232 F. 425; Travelers' Ins. Co. v. Wilkes (C. C. A.) 76 F. (2d) 701; Wigmore

on Evidence, section 2510 (b) (c). Compare cases in note 4. The incidence of the burden of persuasion in these cases is governed by the general principles relating to the subject unaffected by the presumption against suicide."

In *Provident Life & Accident Ins. Co. v. Nitsch* (C. C. A. 5) 123 Fed. (2d) 600, decided Nov. 9, 1941, the court said (p. 603):

"* * * In the many cases decided by this court, pains have been taken to point out the difference between the situation where the question of accidental death comes up on the defense of suicide where the suit is on a life policy, and where it comes up on a suit on an accident policy alleging accidental death. In the first class of cases, the burden is on the defendant to prove suicide and there is a presumption against it. In the second class the burden is on the claimant to show not merely that there was death by violence but that the violence was accidentally rather than intentionally inflicted."

To the same effect are *Reliance Life Ins. Co. v. Burgess* (C. C. A. 8) 112 Fed. (2d) 234; and *Scales v. Prudential Ins. Co. of America* (C. C. A. 5) 109 Fed. (2d) 119.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT IN THE DETERMINATION OF THE SUFFICIENCY OF THE EVIDENCE TO TAKE THE CASE TO THE JURY THE FEDERAL COURT IS BOUND BY THE STATE RULE, IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The Circuit Court of Appeals assumes in its decision that the determination as to where rests the burden of proof is for the state court and that the federal court is bound to follow that determination. It erroneously construes the state decisions as holding that if there is any possibility of accident, the court and jury are bound to find accident. Its assumption that the *Cline* case *supra*

so holds is erroneous. So also is its assumption that if it were the Colorado law, the federal courts would be bound to follow the state ruling. This is directly contrary to decisions of the United States Supreme Court and many other circuits.

In *Crockett v. United States* (C.C.A. 4), 116 Fed. (2d) 646, decided Dec. 21, 1940, involving a question of negligence in an automobile accident case, the court said (p. 650) :

“On the question of the sufficiency of the evidence to take the case to the jury, the federal courts are not bound by the decisions of the state courts. As was said by Judge Parker of this court, in *Gorham v. Mutual Benefit Health & Accident Association*, 4 Cir., 114 F. 2d 97, 99, decided August 22, 1940: ‘Furthermore, while according great respect to decisions of state courts in the matter of direction of verdicts, we are of opinion that this is a matter which is governed by federal practice, and not one wherein local law or local decisions are binding. It goes to the very essence of the exercise of the judicial function by the federal courts, and is in no sense a matter of local law.’ ”

To the same effect are *Gorham v. Mutual Benefit Health & Accident Ass'n.*, (C. C. A. 4) 114 Fed. (2d) 97, decided Aug. 22, 1940, involving a suit on a policy of accident insurance, and *Herron v. Southern Pac.* 283 U. S. 91, and *New York Life Ins. Co. v. Sparkman*, (C. C. A. 5) 101 Fed. (2d) 484.

THE ERROR IN INSTRUCTING THE JURY WAS NOT REVERSED IN THE LIGHT OF RULE 61 OF THE RULES OF CIVIL PROCEDURE AND OF SECTION 391, TITLE 28, UNITED STATES CODE ANNOTATED.

The rule provides that nothing done by the court is ground for granting a new trial “unless refusal to take such action appears to the court inconsistent with substantial justice.” The statute provides that on appeal the

court shall give judgment after an examination of the entire record without regard to technical errors which do not affect the substantial rights of the parties. An examination of the entire record in this case is convincing that substantial justice was done and that the error complained of affected no substantial right and had no effect whatever on the verdict.

In *Bruno v. United States*, 308 U. S. 287, 84 L. Ed. 257, Mr. Justice Frankfurter speaking for the court said, relative to the refusal of the trial judge to instruct that the failure of defendant to testify did not create a presumption against him in a criminal case (p. 294):

“Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that *Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict*. Of a very different order of importance is the right of an accused to insist on a privilege which Congress has given him.”

In *Berger v. United States*, 295 U. S. 78, 79 L. Ed. 1314, decided April 15, 1936, the Court said (p. 1318):

“Evidently Congress intended by the amendment to § 269 to put an end to the too rigid application, sometimes made, of the rule that error being shown, prejudice must be presumed; and to establish the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless. See *Haywood v. United States* (C.C.A. 7) 268 F. 795, 798; *Rich v. United States* (C. C. A. 8) 271 F. 566, 569, 570.”*

*Compare *McCandless v. United States*, 298 U. S. 342, 80 L. Ed. 1205; *Lynch v. Oregon Lumber Co.* (C.C.A. 9) 108 Fed. (2d) 283; *Morgan v. United States* (C.C.A. 8) 98 Fed. (2d) 473; *Nash v. United States* (C.C.A. 2) 54 Fed. (2d) 1006.

In *Morgan v. Sun Oil Co.* (C.C.A. 5) 109 Fed. (2d) 178, decided January 15, 1940, the court said (p. 181):

“Harmless error is not ground for setting aside or disturbing a verdict or judgment. *We sit to do substantial justice and where, as here, after an examination of the entire record before us it appears that substantial justice has been done, the judgment will not be disturbed.* Rule 61 of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c; 28 U.S.C.A. section 391.”

In *Morgan v. United States* (CCA 8) 98 Fed. (2d) 473, decided August 9, 1938, the court said (p. 477):

“‘If the judgment is right, the end of the law has been attained, and it ought not to be disturbed.’”

citing cases.

In *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, Mr. Justice Cardozo, speaking for the court, said (p. 687):

“* * * There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.”

In 25 *Virginia Law Review*, 261 (Jan., 1939), Dobie, the well-known writer on federal procedure, said of this rule:

“It is fondly to be hoped that the federal judges will appreciate that this rule really means what it says. This sentence” (the second sentence of the rule) “put in out of abundant caution, merely

briefly and generally restates in different words the same idea contained in the first sentence. Certainly it is directly opposed to the ancient law that prejudice will be presumed from any error."

CONCLUSION.

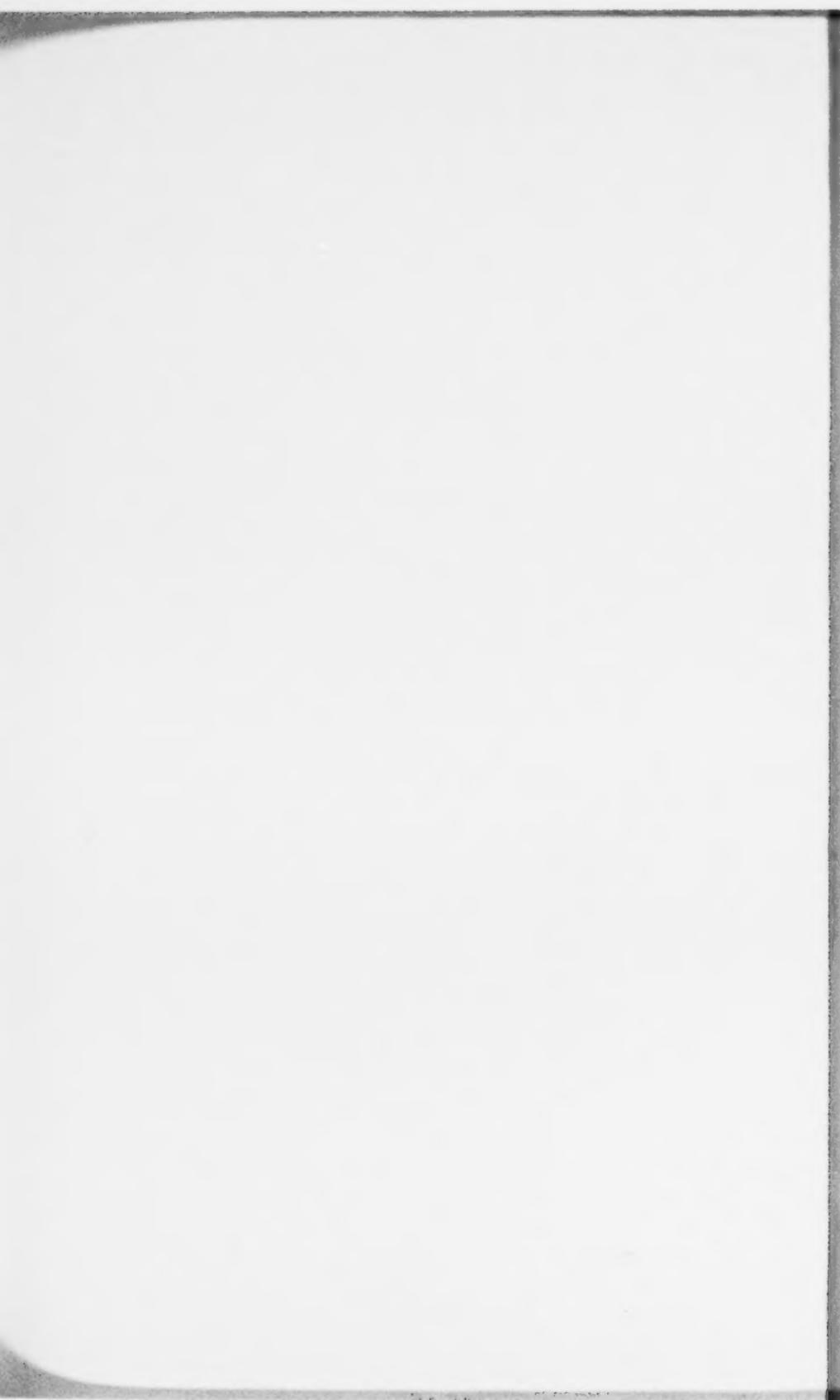
For the foregoing reasons it is submitted that a writ of Certiorari should issue to the Circuit Court of Appeals for the Tenth Circuit.

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No. 241

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In the
Supreme Court of the United States
OCTOBER TERM, 1942

KANSAS CITY LIFE INSURANCE COMPANY, a Corporation,
PETITIONER,

v.

CARRIE J. PARFET, Administratrix of the Estate of George
W. Parfet, Deceased.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF
WRIT OF CERTIORARI

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In the
Supreme Court of the United States
OCTOBER TERM, 1942

No. 241

KANSAS CITY LIFE INSURANCE COMPANY, a Corporation,
PETITIONER,

v.

CARRIE J. PARFET, Administratrix of the Estate of George
W. Parfet, Deceased.

**BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF
WRIT OF CERTIORARI.**

I.

STATEMENT OF CASE.

This is an action begun in the United States District Court for the District of Colorado under the accidental death (double indemnity) clause of a life insurance policy. The respondent, plaintiff in the District Court, is a resident and citizen of the State of Colorado. The petitioner, the defendant in the District Court, is a citizen of the State of Missouri and a corporation incorporated under the laws of the State of Missouri. The matter in controversy exceeds Three Thousand Dollars (\$3,000.00) (R. p. 7).

The jurisdiction of the District Court is dependent upon diversity of citizenship and the requisite amount.

After the trial, lasting two days, the jury returned a verdict in favor of the defendant and judgment of dismissal was entered thereon (R. p. 13). A motion to set aside the verdict and judgment and for a new trial was filed by the respondent (R. pp. 14-18). The District Court entered its memorandum opinion denying respondent's motion and entered its order denying said motion (R. pp. 18-20).

An appeal was duly perfected to the United States Circuit Court of Appeals for the Tenth Circuit. On May 19th, 1942, the Circuit Court of Appeals rendered its decision (R. pp. 153-156) and, on the same day, the Circuit Court of Appeals entered its order reversing and remanding the cause to the District Court for further proceedings in conformity with the views expressed in said opinion (R. p. 156).

The petitioner now seeks to have this Court issue a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, under the provisions of Section 347 of Title 28, U. S. C. A. (Sec. 240(a), of the Judicial Code as amended by the Act of February 13, 1925).

II.

PLEADINGS.

In her complaint (R. pp. 7-11), the plaintiff alleged that she was the duly appointed, qualified and acting administratrix of the Estate of George W. Parfet, Deceased, and was authorized and empowered by the County Court of the County of Jefferson, Colorado, to bring and prosecute this action.

Respondent further alleged that on May 19, 1938, the defendant issued its policy of insurance upon the life of George William Parfet in the sum of Six Thousand Dollars (\$6,000.00) and that in consideration of the payment of an extra premium the petitioner attached to said policy a certain agreement commonly referred to as "double in-

demnity benefit". Said double indemnity agreement is set out in full in the record (R. pp. 8-9).

In paragraph 6 of her complaint, the respondent further alleged that on March 21, 1940, the said George W. Parfet was fatally injured by an explosion of dynamite near Golden, Colorado, and that the death of said George W. Parfet resulted independently and exclusively of all other causes, solely from bodily injury effected directly by external, violent and accidental means within a few hours from the happening of said injury, of which there were visible contusions and wounds on the exterior part of the body of said George W. Parfet.

In said Complaint, the respondent prayed judgment against the petitioner for Six Thousand Dollars (\$6,000.00) together with interest and costs.

The petitioner filed its answer to said Complaint wherein it admitted the death was caused by explosion but denied the allegations of Paragraph 6. It admitted all other parts of the complaint excepting the right to judgment. In addition, the defendant alleged that the death of said George W. Parfet resulted from self-destruction.

III.

FACTS.

On the morning of March 21, 1940, George Parfet superintendent of the Parfet and the Ruby Clay Companies, Golden, Colorado, both companies using dynamite daily in their clay operations, was mangled and crippled by an explosion of dynamite from which injuries he died approximately two hours later. About eight sticks of dynamite exploded at his feet in close proximity to him, just after he had taken the dynamite from a new box of powder. He was then about fifteen or twenty feet away from the powder magazine and on his way (R. 44) to deliver the powder and caps and fuse to Ray Rutledge (R. 37) so that Rutledge could shoot a "slip off of the side of the pit that was getting dangerous to the fellows working below." This was

his custom if there was a big enough rush to get it done so the workmen could get to work early.

Q. "He was anxious to have you shoot that off so the other boys could get to work; was that right? A. That is right" (R. 37).

Although his lower extremities were shattered and mangled by the explosion, Parfet crawled back to the powder magazine. When Mr. Rutledge came out of the pit about five minutes later, he found Mr. Parfet sitting on the ground trying to explode a cap with a file. After Mr. Rutledge took the file, cap, and powder away from Parfet and laid Parfet's head on his lap, Parfet stated, "I did a heck of a job of it," referring to his failure to bring the dynamite caps and fuse to him to shoot down the slip (R. 136).

The local doctor then came and questioned Parfet. Parfet told the Doctor that he was "in a jam". That was a favorite expression of his used on all occasions as shown by all of the evidence and had no significance, as these last words of the dying man were uttered when he was so shocked that he was crazy and so racked with pain and suffering that he could not stand it and asked the doctor to put him "out" of his pain. There were no eye witnesses to the explosion.

Mr. Parfet was a man experienced with powder, which he handled or was handled under his supervision daily. There was no reason why he should want to commit suicide. In fact, all of the evidence shows he had everything to live for and had just acquired the controlling interest in the clay properties. He had just purchased a new car for his son Bill who was graduating from the University of Michigan at Ann Arbor. He was living happily with his wife in their home at Golden, Colorado. He was normal and acting in his usual and customary way prior to the time of the explosion. The various powder men in his employ testified, and our offer was made to prove, that a man familiar with powder would not explode it at his feet if he intended

to commit suicide, but would place it in his hat, or under his arm or near some other vital spot as he was trying to do after he had been mangled and crippled by the accidental explosion at his feet. The evidence shows that Mr. Parfet was a heavy cigarette smoker and that the explosion could have been set off by a spark from a cigarette, the butt of a cigarette, or by the powder and caps falling on the rocky ground. The evidence shows that caps and powder are very uncertain and must be carefully handled and watched at all times as any percussion or friction might set the cap and powder off. As soon as the local doctor arrived and questioned Parfet he passed out, never regained consciousness, and died at St. Anthony's Hospital about two hours later.

The plaintiff introduced the insurance policy and the double indemnity clause which required the defendant insurance company to pay the double indemnity of \$6,000.00 in case of accidental death. The defendant had admitted in its answer that the death was caused by the explosion. The plaintiff thereupon rested. The defendant went forward and introduced evidence attempting to prove that when Rutledge found him after the explosion which crippled and mangled his feet and legs, Parfet was trying to set off the cap, and powder for the purpose of completing the job. Certain witnesses who had talked to Parfet or had seen him a few days before his death and one of the employees of the company who saw him shortly before the explosion testified that he acted in an unusual manner. Defendant also offered evidence that he was highly nervous the day before the explosion. Defendant offered a certified copy of the certificate of death, which was not in the form required by the statute, stating that the death was "suicide," but omitting the word "probably."

IV.

THE JURISDICTION OF THE SUPREME COURT TO REVIEW JUDGMENTS OF A CIRCUIT COURT OF APPEALS IS TO BE EXERCISED SPARINGLY AND ONLY IN CASES OF PECULIAR GRAVITY AND GENERAL IMPORTANCE.

This Court, in a great many cases, has determined that its jurisdiction to review judgments and decrees of the Circuit Courts of Appeal under Section 240 of the Judicial Code (28 U. S. C. A., Article 347) is to be exercised sparingly and only in cases of peculiar gravity and general importance or in order to secure uniformity of decision and except in extraordinary cases, the writ will not be issued until final judgment.

Hamilton Brown Shoe Company v. Wolf Brothers and Company, 240 U. S. 251; 36 Sup. Ct. 269; 60 L. Ed. 269.

American Construction Company v. Jacksonville T. & K. W. R. Co., 148 U. S. 372; 13 Sup. Ct. 758; 37 L. Ed. 486.

Forsyth v. Hammond, 166 U. S. 506; 17 Sup. Ct. 665; 41 L. Ed. 1095.

Here the judgment of the Circuit Court of Appeals (R. p. 157) is that the judgment of the District Court be reversed and the cause remanded for further proceedings. The judgment is therefore not final.

Chicago & N. W. R. Co. v. Osborne, 146 U. S. 354; 13 Sup. Ct. 281; 36 L. Ed. 1002;

Taylor v. Louisville N. R. Co. (mem.), 172 U. S. 648; 43 L. Ed. 1182; 19 Sup. Ct. 887;

John Simmons Co. v. Greer Bros. Co., 258 U. S. 82; 42 Sup. Ct. 196; 66 L. Ed. 475.

Furthermore, in this case the questions involved are of importance only to the parties litigant. The mere fact that the parties are vitally interested in the outcome of this law suit does not make an extraordinary case in which

this Court should issue a writ of certiorari, especially in view of the fact that the judgment of the Circuit Court of Appeals is not a final judgment.

The decision of the Circuit Court of Appeals was based upon a construction of the Colorado law. Whether that decision is right or wrong is not of great importance to anyone excepting to these litigants. The inquiry here as to whether or not the Circuit Court of Appeals has correctly construed the Colorado law should be construed by this Court as not falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them.

In Re Woods, 143 U. S. 202; 12 Sup. Ct. 417;
36 L. Ed. 125.

V.

A WRIT OF CERTIORARI SHOULD NOT BE GRANTED TO REVIEW EVIDENCE OR THE PROPRIETY OF SUBMITTING ISSUES WHICH DEPEND UPON A CONSIDERATION OF EVIDENCE.

This Court lately held in the case of *General Talking Pictures Corp. v. Western Electric Company*, 304 U. S. 175-178; 58 Sup. Ct. 849; 82 L. Ed. 1273, that it would not grant a writ of certiorari to review evidence nor inferences to be drawn therefrom.

In Houston Oil Co. v. Goodrich, 245 U. S. 440; 38 Sup. Ct. 140; 82 L. Ed. 385, this Court held that where the propriety of submitting questions to the jury depends essentially upon an appreciation of the evidence, the writ of certiorari will not lie.

In U. S. v. Johnston, 268 U. S. 220-227; 45 Sup. Ct. 496; 69 L. Ed. 925, this Court said that "we do not grant a certiorari to review evidence or discuss specific facts."

Here the argument of the petitioner rests upon a consideration of the evidence and a discussion of that evidence in order to arrive at the conclusions it has reached. The

petitioner has throughout its brief, gone into the evidence in an endeavor to show that the evidence conclusively shows suicide.

VI.

CONFLICT OF DECISIONS OF CIRCUIT COURTS OF APPEAL ON QUESTIONS CONTROLLED BY STATE LAW IS NOT REASON FOR GRANTING CERTIORARI.

The petitioner, as one of its grounds for issuance of the writ of certiorari in this case, contends that the ruling of the Circuit Court of Appeals is in conflict with the decisions of this Court and other Circuit Courts of Appeal.

This Court has recently held in *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202-206, 58 Sup. Ct. 860, 82 L. Ed. 1290, that:

“As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. * * * ”

A conflict, therefore, between the decision of the Circuit Court of Appeals in this case and decisions of the Supreme Court and decisions of other districts, involving questions of law controlled by the law of states other than Colorado, should not be a ground for the granting of this writ.

Under the case of *Erie R. Co. v. Tompkins*, 304 U. S. 54, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, this Court held that the Federal Courts are bound to follow the decisions of state courts in determining questions involving state law. Prior to that decision, the Federal Courts had followed their own decisions on such questions, but since that decision, this Court has repeatedly held that the Federal Courts are bound by the decisions of state courts.

The latest of such cases is *West v. American Telephone and Telegraph Company*, 311 U. S. 223, 61 Sup. Ct. 179, 85 L. Ed. 196. Therefore, it is respectfully submitted that a conflict of decisions decided by the various Circuit Courts of Appeals cannot be the ground for the granting of certiorari unless such conflict involves the law of one particular state.

VII.

THE CIRCUIT COURT OF APPEALS DECISION THAT IF, UNDER THE EVIDENCE, DEATH BY VIOLENCE CAN BE EXPLAINED ON ANY REASONABLE HYPOTHESIS OTHER THAN SUICIDE, IT IS THE DUTY OF THE COURT OR JURY TO SO FIND, IS NOT CONTRARY TO THE COLORADO RULE.

Petitioner has gone to great lengths in endeavoring to reason that the language of the Circuit Court of Appeals is contrary to the decisions of the Courts of Colorado. The language of the Circuit Court of Appeals, complained of by petitioner, was adopted from the instruction contained in the case of *Prudential Insurance Company v. Cline*, 98 Colo. 275-277, 57 Pac. 2nd 1205. Under the ruling of *Erie v. Tompkins, supra*, a decision of the Supreme Court of Colorado is binding upon the Federal Courts.

(It was indeed a surprise to have counsel for petitioner in their brief filed in this Court, now urge that the Federal Courts are not bound by the Colorado decisions. In the District Court, a directly opposite position was taken by counsel for petitioner. In view of the decision of this Court in *Erie v. Tompkins, supra*, and other cases following that decision, we respectfully submit that no argument need be made that the Federal Courts are bound by the Colorado rule as adopted in its decisions.)

It was early decided by the Supreme Court of Colorado in *Germania Life Ins. Co. v. Ross Lewin*, 24 Colo. 43, 54, 51 Pac. 488, that the defense of suicide raised by an insurance company must be established by clear and satisfactory evidence. The Court there said:

"We are of the opinion that the evidence properly admitted, and that which was offered and erroneously refused, was sufficient to entitle the defendant to have the defense of suicide submitted to the jury; and although such plea, to prevail, must be established by clear and satisfactory evidence, it may, nevertheless, be so established by circumstantial evidence * * *."

In a case involving an accident insurance policy, *Rex v. Continental Co.*, 96 Colo. 467-470, 44 P. (2nd) 911, held:

"When plaintiff established the death of insured to have been accidental, she made out a *prima facie* case under the terms of the policy and the burden then was up on the defendant, if it would avoid payment, to show that the accident was within one of the exceptions named in the policy."

In another case involving an accident insurance policy, *Preferred Accident Insurance Company v. Fielding*, 35 Colo. 19, 22, 23, 83 Pac. 1013:

"* * * When death by unexplained violent external means is established the law does not presume suicide or murder; it does not presume that injuries are inflicted intentionally by the deceased or by some third person; and hence, with the proof indicated, by reason of the presumption which attaches against self-destruction or the violation of the law, *prima facie* proof is also made of the fact that the injuries were accidental without direct or positive testimony on that point. * * *

"* * * Giving the testimony and the inferences which might be drawn the widest scope, the most that can be said is, that it is possible the injuries were not accidentally received; but it falls far short of establishing conclusively that they were intentionally inflicted by the deceased or some third person. On the contrary, under the rules which obtain

in cases of this character it at least supports the presumption that the deceased was accidentally injured. In such circumstances it was therefore the province of the jury under the settled rules of evidence, from the testimony, the facts and circumstances, to determine whether or not the injuries were accidental, when the testimony elicited on that subject was consistent with the theory of an accident."

On page 22 and on page 23, in support of the foregoing the Colorado Supreme Court cited the case of *Travelers Insurance Company v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 Law. Ed. 308.

The Colorado Court of Appeals in *Lampkin v. Travelers Insurance Co.*, 11 Colo. App. 249-256, 52 Pac. 1040, had under consideration an accident policy. There the Court of Appeals said:

"The rule in this case is that the burden is on the defendant in an action of this kind to prove that the death was from one of the excepted causes, at least after plaintiff has made a prima facie showing of accidental death."

In *Bickes v. Travelers Insurance Co.*, 87 Colo. 297-299, 287 Pac. 859, the Supreme Court of Colorado said:

"The evidence was sufficient to require a denial of the motion for nonsuit. It justified a finding that Bickes came to his death by unexplained violent external means, and this is prima facie proof that the injuries were accidental; direct or positive testimony on that point is not required. When death by unexplained violent external means is established, the law does not presume suicide or murder; it does not presume that injuries are inflicted intentionally by the deceased or by some third person. *Preferred Accident Insurance Co. v. Fielding*, 35 Colo. 19, 83 Pac. 1013, 9 Ann. Cas. 916; *Lampkin v. Travelers'*

Insurance Co., 11 Colo. App. 249, 52 Pac. 1040; *Travelers' Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308."

In *Occidental Life Insurance Company v. United States National Bank*, 98 Colo. 126-131; 53 P. (2d) 1180, the Supreme Court of Colorado said:

"When the death by unexpected violent external means is established, the law does not presume suicide or murder; the presumption is to the contrary. Such a showing is *prima facie* proof that the death was accidental. *Preferred Accident Ins. Co. v. Fielding, Admr.*, 35 Colo. 19, 83 Pac. 1013; *Bickes v. Travelers Insurance Co.*, 87 Colo. 297, 287 Pac. 859; *Lampkin v. Travelers Insurance Co.*, 97 Colo. 297, 287 Pac. 859; *Lampkin v. Travelers Ins. Co.*, 11 Colo. App. 249, 52 Pac. 1040. But that *prima facie* showing may be overcome by evidence, either direct or circumstantial. In the present case there was more than the bare fact of death by unexplained violent external means; there were circumstances sufficient to require a finding whether the death was accidental or suicidal. In such a situation the widest latitude of inquiry as to the existence of a motive to commit suicide should be permitted to enable the insurer to overcome, ifg it can, the presumption against suicide. * * * *

The cases cited by the Supreme Court in the above case are all accident policy cases. If the Supreme Court of Colorado intended a different rule to apply in cases where a straight life policy is involved from cases where an accident policy is involved, in that case, it had an opportunity to so determine. It must have determined that when death by violent external means is established, a *prima facie* showing that the death was accidental is made. It therein approved the case of *Occidental Life Ins. Co. v. Graham* (8 C. C. A.), 22 F. (2d) 528. The Graham case involved an accident policy written in Colorado upon the life of a Colorado citizen.

Colorado has consistently held that the general and natural presumption is against suicide.

Hershey v. Agnew, 83 Colo. 89, 262 Pac.;
Prudential Company v. Cline, *supra*.

Here the evidence established death due to external violent means. This was not denied by the petitioner and no evidence was introduced to show that the petitioner's death was due to any other cause than external and violent means. Having shown that death was due to external violent means, the general and natural presumption against suicide made out a *prima facie* case in favor of the respondent. The burden then shifted to the petitioner to prove by direct or circumstantial evidence that the death was not accidental but was due to suicide. The District Court gave an instruction "and it is further admitted by both sides that he died as the result of this explosion of dynamite, and the defendant, the insurance company, setting up suicide, has the burden of proving to your satisfaction by a preponderance of the evidence that his death was suicide. Unless you so find, your verdict must be for the plaintiff. Suicide, as I have stated, gentlemen, must be proven, and if you can reconcile the facts in this case upon any reasonable hypothesis based upon the evidence that the death of the insured was not caused by suicide, it is your duty to do so, and find for the plaintiff. And where a man suffers injuries resulting in his death, which injuries might have been caused by accident or might have been intentionally inflicted upon himself, and there is no preponderance of evidence as to the cause of such injuries, then the presumption is that death was caused by accidental means and not intentionally self-inflicted or suicidal." * * * "Now, that, gentlemen, is some of the law which will govern you in deciding this case. The defendant insurance company must prove to your satisfaction that this death resulted from suicide; that is, under these circumstances that he caused this dynamite to explode, which resulted in his death. Otherwise your verdict must be for the plaintiff."

The decision of the Circuit Court of Appeals is not contrary to the holding of any Colorado decision. The statements of counsel for petitioner that a different rule applies in a case involving an accident policy, or double indemnity clause is contrary to the holding of the Supreme Court in the cases above cited.

VIII.

THE COURT'S RULING THAT THE TRIAL JUDGE'S COMMUNICATION TO THE JURY BY MEANS OF A DEPUTY MARSHAL AND NOT A BALIFF OUTSIDE OF THE PRESENCE OF COUNSEL CONSTITUTES REVERSIBLE ERROR IS NOT CONTRARY TO THE DECISION OF ANY OTHER FEDERAL COURT.

Counsel for petitioner contend that the ruling of the Circuit Court of Appeals is contrary to the ruling of other Circuit Courts of Appeal. However, the only decision of Circuit Courts of Appeals which is similar in facts to this case is that of *Stone v. U. S.* (6 C. C. A.), 113 F. (2d) 79-77. That case involved a communication by an unauthorized person with the jury.

Here, the jury sent to the Judge a communication by a deputy marshal. The bailiffs were sworn, "You are to suffer no person to speak to them, nor speak to them yourselves, unless to ask them whether they are agreed and that you will not suffer them to separate until they are agreed." Notwithstanding that oath, the bailiffs permitted the deputy marshal to carry a written question from the jury to the trial judge. The trial judge admits that he instructed the deputy marshal to answer verbally, "no."

In all of the cases cited by counsel, the communication was between the Court or some Court official and the jury and in most of the instances was in writing. Here, it was by luck that one of the counsel for respondent discovered the unauthorized communication between the jury and the Court.

In criticizing such conduct on the part of the trial

Court, Circuit Court Judge Hamilton in *Stone v. U. S.*, supra, said:

“Faith in the courts and in the jury system must be maintained and it is proper that on questions such as we have here the rule should be such as to support the faith of all litigants in our judicial system and, as a part thereof, trial by jury. That faith can be sustained only by keeping our judicial proceedings free from the suspicion of wrong. The question is, not whether any actual wrong resulted from the conversation of Calloway with the juror under the circumstances related, but whether it created a condition from which prejudice might arise or from which the general public would suspect that the jury might be influenced to reach a verdict on the ground of bias or prejudice. * * *

“There is no right more sacred than the right to a fair trial. There is no wrong more grievous than its negation. The courts have exercised some discretionary power in dealing with the conduct of juries while not in improper communication with other persons and have not always disturbed verdicts for misconduct which were the result of the uninfluenced action of jurors alone (*Klose v. United States*, 8 Cir., 49 F. (2d) 177), but when jurors have communications with strangers, the case is different and cannot be dealt with so easily. * * *

Litigants before the Federal Court are entitled to believe that the oath of the bailiffs will be complied with, not only by the bailiffs themselves, but also by the Court. It should not be necessary for litigants, after Court is adjourned in the evening, to remain in the court room to see that a Federal District Judge does not have unauthorized communication with a jury which is then deliberating upon the case. If the action of the trial court in this case be sustained, there is no alternative left for parties litigant except to remain in attendance at all times.

Parties litigant are required to advance the expenses of the jury and of the bailiffs during the time the jury is deliberating. Those expenses include not only meals but also rooms. Here the respondent contributed her share. The result was that after relying upon the supposition that the bailiffs would suffer no one to speak to the jury nor speak to the jury themselves, an unauthorized conversation was had by the chief deputy marshal with the jury. It is difficult to explain to clients how such irregularities can be permitted.

The trial court in this case has been reversed on previous occasions because of extra judicial communications with the jury.

Fina v. U. S., 46 Fed. (2d) 643;
Little v. U. S., 73 F. (2d) 861.

The provisions of Rule 61 of the Rules of Civil Procedure and of Section 391, Title 28, U. S. C. A., should not be extended to include the practice of Federal Courts such as is here involved. The Federal Courts themselves should be zealous in maintaining the dignity of those courts. Actions on behalf of a Federal Trial Court, such as here involved, cannot be conducive to maintaining the confidence which the people are entitled to have in their Federal Courts.

The Tenth Circuit Court of Appeals was not only correct in its rulings on this point but the ruling of that court tends to maintain the dignity which belongs to a Federal Court. It will go far in maintaining confidence in the Federal Courts.

When the facts are all considered, the only Federal Case which is similar to the case under consideration is that of *Stone v. U. S.*, *supra*, the holding of which is similar to the holding of the Tenth Circuit Court of Appeals here.

CONCLUSION.

No question of gravity or importance is here involved. Where the facts are similar, there is no conflict of decision among various Circuit Courts of Appeal. The decisions of the Tenth Circuit Court of Appeals is in accord with the decisions of the Colorado Supreme Court in similar cases.

It is, therefore, respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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(7)

FILED

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CHARLES ELIJAH SHAFROTH
CLERK

No. 241

In the
Supreme Court of the United States
OCTOBER TERM, 1942

KANSAS CITY LIFE INSURANCE COMPANY, a Corporation,
PETITIONER,

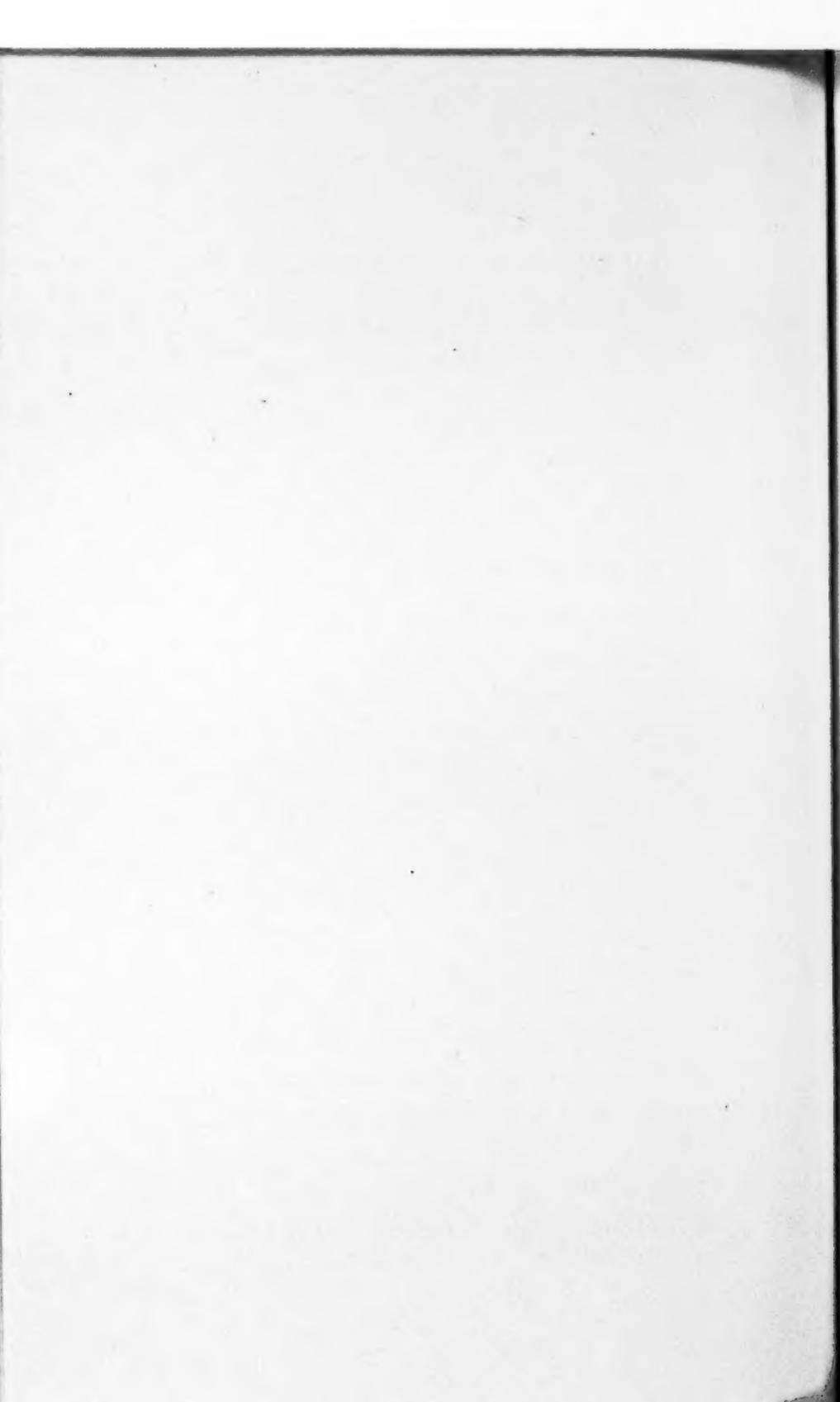
v.

CARRIE J. PARFET, Administratrix of the Estate of George
W. Parfet, Deceased.

REPLY BRIEF.

MORRISON SHAFROTH,
Denver, Colorado,
Attorney for Petitioner.

W. W. GRANT,
HENRY W. TOLL,
DOUGLAS McHENDRIE,
CHARLES H. HAINES, JR.,



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KANSAS CITY LIFE INSURANCE COMPANY, a Corporation,
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v.

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W. Parfet, Deceased.

REPLY BRIEF.

Petitioner contends that a fair trial was had in this case and that the error on which the Circuit Court reversed was purely technical. Moreover, the Circuit Court depended in reversal on a wholly mistaken interpretation of Colorado law.

(1) Respondent says that the jurisdiction of the Supreme Court to review on certiorari is to be exercised sparingly.

This is conceded. Rule 38 5(b) defines the character of cases in which certiorari will be granted. This case falls clearly within the first three and probably within the first four of the grounds for certiorari set forth in that rule, to-wit: A conflict in the decision sought to be reviewed with the decisions of other circuits on the same matter;

the decision of an important question of local law in a way probably in conflict with applicable local decisions; the decision of an important question of federal law which has not been but should be settled by this court; and, probably, the decision of a federal question in a way in conflict with applicable decisions of this court.

(2) Respondent contends that the writ should not be granted to review evidence.

The court in this case is being asked to review certain specific rulings of law. The discussion of the evidence is merely incidental to assist the court in determining the applicable rules of law.

(3) Respondent's brief contends that a conflict in the decisions of circuit courts on questions controlled by state law is not ground for granting certiorari.

The question as to whether it is reversible error for a United States judge to answer a question of the jury as was done in this case is clearly not one of state law. The circuits moreover are in conflict as to whether in the determination of the sufficiency of the evidence to take the case to the jury the federal court is bound by the state rule, as was held by the Circuit Court of Appeals in this case.

WHERE THE RESULT IS CORRECT AND NO OTHER VERDICT COULD BE SUSTAINED UNDER THE EVIDENCE, INTERVENING ERRORS DO NOT WARRANT REVERSAL.

Respondent's brief contends that the Circuit Court's statement of the Colorado rule on presumption and burden of proof is correct.

A brief examination of the authorities is convincing that it is in conflict with the applicable decisions of the Colorado Supreme Court, the highest court in the state.

This question arises in the following manner: Petitioner contended in the Circuit Court of Appeals, first, that the error of the judge in communicating with the jury

outside the presence of counsel was harmless since the categorical answer given to the jury's question was correct and had been covered in the instructions already given, and, second, no intervening errors in connection with the jury could have been prejudicial because under the evidence plaintiff failed to sustain the burden of proving accident and so no other verdict was possible than that actually returned. The lower court so held in denying respondent's motion for a new trial and the fact is obvious from an examination of the undisputed evidence in the case. As is said in *5 Corpus Juris Secundum*, § 1676, p. 805:

“Where the judgment is clearly correct upon the merits, intervening errors will not operate to reverse the judgment. * * * Thus the unsuccessful party cannot complain of any error committed at the trial where not entitled to succeed in any event; and where no other verdict or conclusions could be sustained, or no other judgment properly be entered, a reversal will not be warranted because of intervening errors. If appellee is entitled to an affirmative charge in his favor, errors intervening at the trial afford no ground for reversal.”

In 3 Am. Jur., § 1111, p. 634, it is said:

“One test that has been frequently held determinative of the prejudicial character of error in instructions is the correctness of the result; if that is correct, the error is not reversible.”

Again, in *Chicago, Milwaukee & St. Paul Ry. Co. v. Ross*, 112 U. S. 377, 28 L. Ed. 787, this court said in the closing paragraph of the opinion (p. 794):

“ * * * The charge on the other points is immaterial; whether correct or erroneous, it could not have changed the result; the verdict of the jury could not have been otherwise than for the plaintiff.”

To the same effect are: *Tua v. Carriere*, 117 U. S. 201,

29 L. Ed. 855, 858; *Walbrun v. Babbitt*, 83 U. S. 577, 21 L. Ed. 489; *Barth v. Clise*, 79 U. S. 400, 20 L. Ed. 393; *Maynard v. Finney*, 92 Fed. (2d) 454, 455; *Scofield v. Scofield*, 89 Colo. 409, 3 Pac. (2d) 794; *Taylor v. Bastian*, 26 Colo. App. 185, 186; *Richmond v. Virginia Bonded Warehouse Corp.*, 148 Va. 60, 138 S. E. 503.

THE CIRCUIT COURT MISINTERPRETS THE COLORADO CASES.

Both the Circuit Court of Appeals and respondent in effect concede that this would be true except for what they claim is a special rule in Colorado relieving plaintiff from the burden of proving accident and requiring defendant to prove suicide beyond a reasonable doubt. Respondent and the Circuit Court of Appeals erroneously assume that the rule in a straight life insurance case and that in an accidental death case are identical under Colorado law. The Colorado Supreme Court has clearly pointed out the distinction in *Capitol Life Ins. Co. v. Di Iullo*, 98 Colo. 116, where it says (pp. 118, 119):

“In the case of a straight life insurance policy proving for the payment of money upon the death of the insured the condition upon which liability depends is the death of the insured, and, his death being shown, the loss comes within the coverage of the policy, * * * .

“* * * Where, however, a policy provides for the payment of money upon the death of the insured as a result of accident, there are two conditions upon which liability depends; namely, (1) death of the insured and (2) accidental cause of such death. * * * *It may just as reasonably be held that on a straight life insurance policy, providing for the payment of money on the death of the insured, the insurer is liable where there has been no death, as to hold that on a policy providing that money shall be paid in case of death by accident, the insurer is liable where there has been no accident.*” (Italics supplied.)

This is in accord with the federal cases including those of the United States Supreme Court set forth in petitioner's opening brief at pp. 29-32 inclusive.

The most that can be claimed by respondent from the Colorado cases cited by her is that proof of death by unexplained, external violence makes a prima facie showing of accidental death. In this case petitioner met that showing first by the corner's death certificate showing suicide, to which the Colorado statute¹ gives the effect of prima facie proof of the matters contained therein, and, second, by the decedent's own explanation both in words and action of what happened and why he killed himself. Respondent and the Circuit Court of Appeals contended that it was necessary for defendant to overcome the original prima facie case of accidental death by proof virtually beyond a reasonable doubt. This is in direct conflict with the settled law of the State of Colorado as laid down by the Supreme Court in *Roeber v. Cordray*, 70 Colo. 196, where the court said (p. 198):

“ * * * It is perfectly clear, therefore, that to break the force of a prima facie case it is not necessary that the contrary shall be established by a preponderance of the evidence, but that it is sufficient if, from the evidence pro and con, the plaintiff cannot be said to have a preponderance upon his side of the issue.”

Respondent's and the Circuit Court's reliance on a straight life insurance case² demonstrates a complete misunderstanding and misinterpretation of the applicable decisions of the Colorado Supreme Court. A glance at the cases cited by respondent is conclusive on this point.

¹Chap. 78, § 128, Colo. Stat. Ann., 1935: “ * * * such copy * * * shall be prima facie evidence in all courts and places of the facts stated therein.”

²The Circuit Court relied solely on the straight life insurance case of *Prudential Life Ins. Co. v. Cline*, 98 Colo. 275, 57 Pac. (2d) 1205.

The first case cited by respondent is *Germania Life Ins. Co. v. Ross Lewin*, 24 Colo. 43, a straight life insurance case in which no question of accident was involved and which obviously under the ruling of the Supreme Court heretofore cited has no bearing on the question here.

The second case is *Rex v. Continental Co.*, 96 Colo. 467. In that case accidental death was admitted and the court merely held that the burden was on the defendant to prove that decedent was outside the line of employment covered in the policy if it would avoid payment on that ground.

The case of *Preferred Accident Ins. Co. v. Fielding*, 35 Colo. 19, obviously does not sustain the Circuit Court's interpretation of the Colorado law. The court merely held there that when the evidence was consistent with accidental death and with the presumption against suicide, the case should go to the jury. It certainly did not hold that the jury must find the death accidental if there was any possible hypothesis on which it could do so. Yet, that is what the Circuit Court here says is the rule.

Lampkin v. Travelers' Ins. Co., 11 Colo. App. 249, decided in 1898, is an old decision of the Colorado Court of Appeals—a court long since abolished. The court there held that it was improper to grant a non-suit where there was a showing of death by wholly unexplained, external violence since that alone constituted a *prima facie* showing of accidental death. The later decisions of the Colorado Supreme Court—*Roeber v. Cordray*, (1921) 70 Colo. 196; *Capitol Life Ins. Co. v. Di Iullo*, (1935) 98 Colo. 116; and *North American Accident Co. v. Cavalieri*, (1935) 98 Colo. 565—all indicate clearly that the mere making of a *prima facie* case does not shift the burden of proof.

Respondent further cites the case of *Bickes v. Travelers' Ins. Co.*, 87 Colo. 297, which held that proof by death by unexplained, violent external means makes a *prima facie* case sufficient to prevent non-suit. To the same effect is *Occidental L. Ins. Co. v. N. S. Nat'l Bank*, 98 Colo. 126.

Respondent also cites *Occidental Life Ins. Co. v. Graham*, 22 Fed. (2d) 528, but mistakenly asserts that the policy involved was an accident policy. It was not. It was a straight life insurance policy which obviously has no bearing on the problem here.

The highest court in Colorado has repeatedly asserted that in an accidental death case the burden is on the plaintiff to prove accident, that a prima facie showing of accident is made when death by unexplained, violent external means is shown, but that in order to overcome a prima facie case it is not necessary to prove the contrary conclusively or beyond a reasonable doubt or even by a preponderance of the evidence. On the contrary, the highest court of the state has clearly and plainly asserted that the burden remains on the plaintiff, taking all the evidence into consideration, to prove accidental death by a preponderance of the evidence and if he fails to do so, he cannot recover.

The statement of the Circuit Court, therefore, to the effect that defendant must prove suicide in effect beyond a reasonable doubt is directly contrary to the settled rule of the Colorado Supreme Court. Yet it is on the basis of this alleged Colorado rule that the court reversed in this case. Considering a purely speculative and conjectural case as to how an accident might have happened, the Circuit Court disregarded the long line of cases cited on pages 17-19 of petitioner's opening brief and based its decision on this supposed peculiarity of Colorado law.

THE CIRCUITS ARE IN CONFLICT AS TO WHETHER A COMMUNICATION BETWEEN JUDGE AND JURY, AS IN THIS CASE, CONSTITUTES REVERSIBLE ERROR.

Finally, respondent contends that there is no conflict among the circuits on the question as to whether it is reversible error per se to communicate with the jury outside the presence of counsel. She amazingly contends that the only case similar in facts to this is the case of *Stone v.*

United States, (C. C. A. 6) 113 Fed. (2d) 70. That was a criminal case, not a civil case, and was one in which there was an attempt to bribe a juror. The facts do not even remotely resemble those in this case.

Opposing counsel would distinguish all other cases of communication with the jury on his mistaken assumption that the court in this case communicated by means of a deputy marshall and not by a bailiff. The Circuit Court's ruling relies on no such point. Said the Circuit Court of Appeals (R., pp. 153, 154):

“After the case had been finally submitted to the jury, and while the jury was engaged in their deliberations, they handed to the bailiff a note to the judge in which inquiry was made as to whether it was necessary that a motive be shown by the evidence in order to warrant the jury in finding that the death was by suicide. The bailiff handed the note to a deputy United States Marshal; he took it to the residence of the judge and there handed it to him; the judge directed the deputy to answer verbally ‘no’; and that was accordingly done.”

It clearly relies on no such distinction as is sought to be made by opposing counsel in his interpretation of the court's statement of facts.

CONCLUSION.

We respectfully submit that the question whether jury verdicts are to be overturned on technical errors and new trials ordered in the federal courts, where the trial has been fair and the verdict just, is one of great public importance. That question is squarely raised in this case.

This court itself has sought to meet such cases in Rule 61 of its Rules of Civil Procedure, and Congress has attempted to curb the reign of technicality by statutory enactment.

A clearer case of a just verdict, involving a complete failure by plaintiff to sustain her burden of proof, would be hard to find. Neither the Circuit Court nor respondent seriously claim that plaintiff sustained the burden of proving accidental death. Instead, they rely on a palpably erroneous interpretation of Colorado law and insist that defendant must prove the contrary beyond a reasonable doubt.

If in such a case—where the jury really had no function—a technicality in the manner—not the substance—of an instruction can require parties to retrace the long road of litigation, call back a jury, bring in the witnesses, re-argue the case, and once more appeal to the Circuit Court and then to this court, with, it may be, some new technicality, then indeed the statute and the rule are but feeble weapons of justice.

Respectfully submitted,

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